DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	**MM Docket No. 91-221**
	)	
Television Satellite Stations Review of Policy and Rules	)	**MM Docket No. 87-8**

To: The Commission

COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom") respectfully submits these Comments in response to the *Second Further Notice of Proposed Rule Making* (*"Second Further Notice"*) in the above-captioned proceedings

I. INTRODUCTION

By this *Second Further Notice*, the Commission invites comments on local ownership rules involving television stations, specifically the local television ownership (or television "duopoly") rule, the "satellite" television exemption to the duopoly rule, and the television-radio cross-ownership (or "one-to-a-market") rule. Viacom herewith submits comments relating only to the duopoly rule and its relationship to local marketing agreements (LMAs)

Subsidiaries of Viacom hold licenses of eleven television stations, ten of which are UHF stations and nine of which are UPN affiliates. The Viacom stations reach approximately 19% of the nation's homes (approximately 10% by measure of the "UHF discount").[1] Viacom is also the 50%-owner of UPN, a nascent television network co-owned by a subsidiary of Chris-Craft Industries, Inc [2] Viacom, through its Paramount Pictures subsidiary and through its majority ownership of Spelling Entertainment Group, also produces network programs and produces and distributes syndicated television programs, and engages in the distribution of off-network television product.[3] Viacom is the indirect licensee of a station in the Hartford - New Haven - New Britain - Waterbury - New London market and, through an LMA, programs 27 5 hours per week of news and children's programming on another station in the market

As set forth in its comments in the companion rule making proceeding relating to attribution, *see Further Notice of Proposed Rule Making* in MM Docket Nos. 94-150, 92-51, and 87-154 (*Attribution Further Notice*), FCC 96-436 (released November 7, 1996), Viacom supports a tightening of the rules to more realistically reflect "ownership" of broadcast interests Viacom believes, however, that the adoption of more restrictive attribution rules should be accompanied by relaxation of the local television ownership rules from a Grade B contour standard to a DMA standard While on the surface this tandem approach may appear contradictory, Viacom believes that it will actually spur competition and result in more diversity of programming

---

[1] Those eleven stations are: WPSG(TV), Channel 59, Philadelphia; WSBK(TV), Channel 38, Boston; WBFS(TV), Channel 33, Miami; WDCA(TV), Channel 20, Washington, D.C.; WKBD(TV), Channel 50, Detroit; KTXH(TV), Channel 20, Houston; KTXA(TV), Channel 21, Dallas; WVIT(TV), Channel 30, Hartford, WTOG(TV), Channel 44, St. Petersburg, WUPA(TV), Channel 69, Atlanta; and KMOV(TV), Channel 4, St Louis

[2] The UPN network, through its affiliates, reaches 74% of the nation's households through primary affiliates and another 20% through secondary affiliates.

[3] In addition, Viacom wholly owns several cable television networks, including MTV: Music Television, M2, VH1, Nickelodeon/Nick at Nite, Nick at Nite's TV Land, Showtime, The Movie Channel, Flix, and co-owns the USA Network, Comedy Central, Sci-Fi Channel, All News Channel and Sundance Channel.

II. The "Duopoly" Rule

A. Grade A and B Contours Are Engineering Creations And Should Have No Basis in Economic Competition or Diversity Analyses

The present local television ownership, or "duopoly," rule, Section 73.3555(b), prohibits common ownership of television stations whose Grade B contours overlap This standard has defined local television ownership limits for 23 years, since 1964 *See Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 FCC Rcd 1476, *recon. granted in part*, 3 RR 2d 1554 (1964). Prior to that time, the Commission had evaluated common ownership of television and of AM and FM services on an *ad hoc* basis. Adopting a fixed standard based upon contours for television and radio services, the Commission reasoned, assured a greater degree of certainty than under a case-by-case analysis *See id.* at 1476 The Grade B contour, the "more restrictive" standard, was selected as the rule for television because "television has a considerably greater impact" than radio and because there were fewer television than radio channels available *Id.* at 1484 Accordingly, the Commission declined to adopt a standard based upon the geographically smaller, Grade A contour.

In 1964, when the television duopoly rule was adopted, there were approximately 560 commercial television stations and a small number of cable systems whose primary purpose was to retransmit the signals of over-the-air broadcast stations Today there are well more than double that number of commercial television stations in the U S *See FCC Broadcast Station Totals* as of December 31, 1996, FCC News Release (January 21, 1997) And more than 67% of all U.S television households now subscribe to cable or another multichannel video programming service. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 96-496 (released January 2, 1997) This burgeoning growth in video programming delivery over the last few decades prompted the Commission to initiate this proceeding and to propose modifications to the geographic standards for local television ownership rules. *See Further Notice of Proposed Rule Making* in MM Docket Nos. 91-22 and 87-8, (*Further Notice*) 10 FCC Rcd 3524 (1995).

The Commission now proposes, in this *Second Further Notice*, the adoption of a Grade A contour/DMA approach, whereby common ownership of television stations would be prohibited where either the Grade A contours of the stations overlap or the stations are located in the same DMA. In proposing this approach, the Commission acknowledges that the "DMAs may be better than either Grade B or Grade A signal contours as measures of the market," but nevertheless seeks to supplement the DMA with a Grade A overlap criterion "to forestall potentially anti-competitive and diversity-reducing mergers in the broadcast television industry." *Second Further Notice*, FCC 96-438 at ¶20

Grade A and Grade B field strength contours are purely engineering creations. Under Section 73.683 of the Commission's Rules, 47 C.F.R. §73.683, the contours only indicate the approximate strength of signal reception over average terrain in the absence of interference from other television stations. In lay terms, Grade B service is that in which the quality of picture is expected to be satisfactory to the median observer at least 90% of the time for at least *50%* of the receiving locations within the contour, in the absence of interfering television signals. Grade A service is that in which picture quality should be satisfactory at least 90% of the time for at least *70%* of the receiving locations. "Under actual conditions," according to Section 73.683, the "true coverage may vary greatly" because the terrain over a given path is expected to be different from the average terrain on which the field strength charts are based. In short, Viacom submits that while they may be administratively convenient, field strength contours --whether Grade B or Grade A-- have no basis in economic competition or diversity analyses.

B. The DMA Alone Should Define "Local" For Ownership Purposes

Unlike Grade A and Grade B field strength contours, DMAs (and, previously, ADIs) were devised by the private sector to assist television stations in assessing their competitive status locally and to aid advertisers in making buying choices both locally and nationally. Thus, DMAs attempt to determine the actual television viewing patterns, with each county assigned to one DMA. Indeed, DMAs have become the *de facto* definition of "local" for the television industry in terms of economic competition and even, (in the absence of ADIs,) for purposes of defining the must-carry region for commercial television stations. The Commission has also recognized in this proceeding that DMAs may be "more descriptive" of a broadcast television stations' potential market. *Second Further Notice*, FCC 96-438 at ¶14 (*citing*, *Further Notice*, 10 FCC Rcd at 3577.)

Despite the universal acceptance of the DMA as the "reasonable proxy" of a television station's geographic market, the *Second Further Notice* falls short of adopting the DMA as the standard for local ownership and proposes instead that the DMA be "supplemented" with a Grade A contour criterion. Two reasons are cited: first, because television stations with overlapping Grade A signal contours, whether in the same DMA or not, *"may compete"* for viewers and advertising dollars, and second, the common ownership of two television stations in different DMAs with overlapping Grade A signal contours *"may reduce"* voice and program diversity available to the viewers in the overlap area. *Id.* at ¶20.(emphasis added) Viacom suggests that engineering based, geographic line-drawing serves no purpose other than to establish a bright line test of predictability. However, adoption of a companion DMA standard serves the very same purpose and therefore makes the Grade A measure merely redundant. In adopting a rule of general applicability such as the local television ownership rule whose objectives are to help ensure competition and diversity, the Commission should rely on those boundaries which reflect what the Commission termed the "area of effective competition" for the delivered video programming and local advertising markets, as well as for diversity. *See Further Notice*, 10 FCC Rcd at ¶¶ 31, 44 As an experienced broadcaster, Viacom submits that because television station licensees direct their resources and personnel to attaining superior ratings within the given DMAs, not within their Grade A or Grade B contours, the DMA alone should define "local." Supplementing the DMA standard with a Grade A contour is excessive and unnecessary and is predicated on concerns that appear more speculative than real

As the 50%-owner of the nascent UPN Network, Viacom champions the principle of diversity of programming voices Indeed, the success of UPN, which competes directly with the four established networks of ABC, CBS, NBC and FOX, as well as with another new network, the WB, depends upon securing affiliates in every market in the country While Viacom encourages group and non-group owners alike to purchase or construct television stations and affiliate with UPN, such owners with the requisite capital in today's buying market are scarce *See, e.g.*, Petrozello, "Trading Market Explodes" *Broadcasting & Cable* (February 3, 1997 at 18-19 The efficiencies to be realized from consolidating certain "non core" operations (such personnel administration, traffic, marketing and promotion, accounting and legal support) of stations in separate, but adjacent markets could provide otherwise missing critical economic efficiencies which stations independent of the established networks need to ensure their competitiveness and economic stability, thereby making them available for affiliation with new networks and programmers However, a Grade A contour standard linked to a DMA Standard might foreclose a group owner from realizing such efficiencies even where the DMAs are distinct and separate For example, if a broadcaster owns a CBS affiliate in Miami it could not, under the Commission's proposed local television ownership rule, purchase a potential UPN affiliate in West Palm Beach, which, while located in a DMA discrete from the Miami DMA, has Grade A contour overlaps with the Miami station Rather than risk the arduous process of seeking a waiver of the Grade A contour rule (as proposed in the *Second Further Notice*) and concomitantly dissuading a seller who may, absent the waiver issue, otherwise be anxious to sell to the particular broadcaster in question, that broadcaster could likely lose the opportunity to purchase the station. A more restrictive local ownership rule, could in this way impair a new network's ability to successfully launch in all markets while not genuinely addressing diversity concerns.

III Local Television Ownership Waiver Standards

A The Commission Should Adopt Only Those Waiver Standards That Maintain or Augment the Number of Television Outlets

The importance to UPN of television outlets not affiliated with the established networks cannot be adequately underscored. For UPN to succeed as a new network providing competition and programming diversity nationwide, there must be at least five and perhaps even six television station outlets in every market. Because the only means for insuring the viable operation of at least five stations in a market may be through "duopoly" ownership or same-market LMAs, Viacom strongly urges that the Commission permit such arrangements via a clear and precise "failed station waiver" to the local television ownership rule in instances where the economic viability of a fifth or sixth "independent" station is at issue.

While Viacom supports the Commission-proposed failed station waiver standards to address means of maintaining the number of television outlets in a market, it also believes that the standard must be coupled with safeguards to preclude such waivers from being granted where the true interest is not to increase program diversity but to further anticompetitive motives. The Commission must be diligent so as not permit such waivers where the purchasing or brokering station is another network or a network O & O whose true interests may lie in obtaining control of a second station in a market for the purpose of depriving new networks of affiliates and thereby inhibiting network competition. One way to address this issue would be for the Commission to investigate, in waiver request situations, whether or not buyers other than those independent of a network would be willing to purchase the station and affiliate it with a network service not otherwise present in the market. If so, a network with an outlet already in the market should be denied a waiver

B. UHF Combinations

Under a straight-forward DMA standard, broadcasters would seek fewer waivers and the Commission could be expected to grant even fewer than it might under a companion Grade A overlap standard Indeed, the *Second Further Notice* contemplates possible wholesale exemptions or waiver categories for combinations involving UHF stations However, as the direct or indirect licensee of eleven television stations, ten of which are UHF, Viacom believes there is in fact no competitive or diversity rationale for such special treatment of UHFs Indeed, if the Commission were to adopt a DMA-only based local ownership rule and couple it with a proper failing station waiver policy, this would effectively function as a UHF exemption policy

C. Vacant and New Channel Allotments

While the failed or failing station standard would contribute to the maintenance of the number of television outlets in a market, adoption of a vacant and new channel allotments standard would contribute to an increase Both standards would promote the presence of five or more stations in markets, which is vital to the growth of new networks Allotted broadcast channels that have lain fallow for several years or which have been the subject of failed applications should not be left dormant merely because the only potential applicant is a same-market broadcaster Indeed, because Viacom subscribes to the concept that more outlets result in a diversity of programming, it urges the Commission to adopt a standard for waiver of the local ownership rule for the construction of new stations

To establish, however, as the Commission proposes, a five-year period of dormancy or a five-year history of failed applications as the standard for granting waivers of the local ownership rule may discourage those broadcasters eager to pursue such channel allotments today. Indeed, a number of new station applications were recently filed with the Commission in response to a proposed freeze on such applications for the transition to digital. *See Advanced Television Systems and Their Impact on the Existing Television Service, Sixth Further Notice of Proposed Rule Making* in MM Docket No. 87-268, FCC 96-317 (released August 14, 1996). It would appear, therefore, that any allotments not applied for as of this date are those channels in those markets which cannot support a stand-alone station. Therefore, any same-market broadcaster ready, willing and able --upon lifting of the application freeze-- to invest the monies in engineering research for a new station and construction of that station should be granted a waiver from the local television ownership rule, bearing in mind the need for vigilance where the frequency is sought by an established network or its O & O. Competing applications should be entertained for those vacant and new allotments, but only in the event no other drop-in vacancies are possible in a market.

IV. Local Marketing Agreements

A. Background

In comments filed in connection with the companion proceeding to this one, *Attribution Further Notice*, Viacom is urging the Commission to adopt an "equity-or-debt-plus" attribution rule that would render an interest cognizable where a party holds 10% of the vote and/or capitalization of a station and is not contractually precluded from participating in program selection. By this definition, therefore, many LMAs (defined as control by one broadcaster of 15% or more of the average weekly programming of another broadcaster) would be attributable. Consequently, a brokered station in the same DMA as another commonly owned station --if that is the geographic standard adopted-- could violate the local ownership rules. Viacom suggests that in order to help foster the growth of new networks a blanket exemption to the local ownership rules be made for same market LMAs so as to permit a same market broadcaster to LMA a second station in the market if that second station were to be affiliated with a network other than ABC, CBS, NBC or Fox. Viacom submits that the special benefit such an exemption would provide to emerging networks such as UPN and WB is fully warranted and consistent with similar development protections accorded the infant Fox network by relieving Fox of restrictions under the Prime Time Access Rule (PTAR) and the Financial Interest and Syndication Rules *See Evaluation of the Syndiction and Financial Interest Rules*, 8 FCC Rcd 3094 (1991).

B. Grandfathering/Waiver of Local Ownership Rule for LMAs

Because of the importance of LMAs to upstart networks, such as UPN, Viacom requests that the Commission not disrupt the current LMAs executed or renewed prior to the adoption date of the *Second Further Notice*, on November 5, 1996 by permitting them to continue for the shorter of their current term or five years. After that time, the FCC should evaluate the LMA relationship to determine whether its continuation is required to maintain or augment the number of television outlets in the market or provide an outlet for a new network. If so, for the reasons cited above in the context of duopoly waivers for failed or failing stations and for vacant and new channel allotments, and to insure affiliation of the LMAed station with a new network, a same-market broadcaster with an existing LMA should be granted a waiver to continue to broker a station under an LMA for a further term of five years

V. CONCLUSION

For the above reasons, Viacom urges the adoption of a DMA-only standard for the Commission's local television ownership rule and the adoption of clear and precise waiver standards geared to maintaining or augmenting the number of television outlets in a market and promoting new networks. Moreover, while it agrees that LMAs should generally be deemed attributable, Viacom advocates that where initial and renewal terms of those contractual arrangements commenced prior to November 5, 1996, the adoption date of this *Second Further Notice*, those terms be allowed to run for five years or the remainder of their current term, whichever is shorter Viacom also suggests that same-market LMAs be permitted to be renewed where necessary to maintain viable television outlets in a market. Finally, Viacom proposes that a general LMA exemption be adopted so that same market broadcasters could affiliate a second station with new emerging networks, thereby helping these networks to secure their viability in much the same way that the Commission did so on behalf of the Fox network

Respectfully submitted,

VIACOM INC

Edward Schor

Edward Schor
Vice President, Associate
General Counsel Regulatory

Anne Lucey

Anne Lucey
Counsel/Regulatory

February 7, 1997